IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81 6633

DANNY R. BEARDEN,

Petitioner

vs.

STATE OF GEORGIA

Respondent

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SUPREME COURT U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEALS OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Danny R. Bearden, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in the above-entitled case on the 24th day of February, 1982. A copy of the opinion of the Court of Appeals of Georgia is found at pages 65 through 68 of the Petitioner's Appendix to this Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a violation of the Equal Protection Clause of the United States Constitution to revoke an indigent's probation for his failure to pay a fine and restitution, which payment was a condition of his probation, when the indigent person is totally unable to pay the fine and restitution?
2. If answer to the above question is in the negative the second and more specific question is: Whether it is a violation of the Equal Protection Clause of the United States Constitution to revoke an indigent's probation which is being served under the Georgia First Offender's Act (Ga. Code Ann. §27-2727 et

seq.) for his failure to pay a fine and restitution, which payment was a condition of his probation, when the indigent person is totally unable to pay the fine and restitution?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties.

JURISDICTION

The judgment of the Court of Appeals of Georgia sought to be reviewed was dated and entered February 24, 1982. The petitioner filed a timely motion for rehearing which was denied on March 15, 1982. The petitioner subsequently filed a timely petition for writ of certiorari in the Supreme Court of Georgia which was denied on April 8, 1982.

The petitioner asserts that 28 U.S.C. §1257(3) confers upon this Court jurisdiction to review this judgment of the Court of Appeals of Georgia by writ of certiorari.

REFERENCE TO PRIOR OPINIONS

There is no written opinion from the trial court or from the Supreme Court of Georgia. The citation for the opinion from the Court of Appeals of Georgia is Bearden v. State, _____ Ga. App. _____, 288 S.E.2d 662 (1982).

CONSTITUTIONAL PROVISIONS AND STATEMENTS INVOLVED

U.S. Constitution Amendment 14, §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code Annotated §27-2727

> Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act [§§ 27-2702 through 27-2726.1]. Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. No person may avail himself of the provisions of this law [§§ 27-2727 through 27-2732] on more than one occasion.
> (Acts 1968, pp. 324, 325.)

Georgia Code Annotated §27-2728

> Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this law [§§ 27-2727 through 27-2732], a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the offender, a record of discharge and exoneration, as above provided, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of Probation shall have been previously forwarded to the office of the State Probation System, the Georgia Crime Information Center and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of such offender has not been forwarded as above provided, upon request of the offender or his attorney or representative such record of the same shall be forwarded by the clerk of the Court so as to reflect such discharge and exoneration.
> (Acts 1968, pp. 324, 325; 1978, p. 1621, eff. July 1, 1978.)

Georgia Code Annotated § 27-2728.1

> Except as otherwise provided in this law [§§ 27-2727 through 27-2732], a discharge under the provisions of this law is not a conviction of a crime under the laws of this State and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.
> (Acts 1978, pp. 1621, 1622, eff. July 1, 1978.)

Georgia Code Annotated § 2-501

The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of person shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons.

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STATEMENT OF THE CASE

On October 8, 1980, Danny Bearden (hereinafter the defendant) entered pleas of guilty to felony indictments for burglary and theft by receiving stolen property. (A. 54, 50). The Honorable Robert E. Coker placed the defendant on probation for a period of three (3) and one (1) years, respectively. (A. 56, 52). This probationary period was to be served under the provisions of the First Offender's Act. Under the Georgia First Offender's Act, when a defendant successfully serves his probation he is discharged without an adjudication of guilt and is completely exonerated of any criminal purpose. Ga. Code Ann. § 27-2728.

On May 14, 1981, James H. Lohr was appointed by the Superior Court of Catoosa County, Georgia to represent the defendant in another charge of burglary, (A. 1), of which the defendant has been acquitted. On May 29, 1981, an Order was entered requiring the defendant to show cause why his probation should not be revoked. (A. 3). The petition to revoke the defendant's probation alleged that the defendant had violated the conditions of his probation by committing the crime of burglary and by failing to make a timely payment of his fine and restitution. (A. 2).

On June 3, 1981, the hearing on the Petition was heard by the Honorable Joseph E. Loggins in the Superior Court of Catoosa County, Georgia. (A transcript of the hearing is found at pages 4 through 59 of the Appendix to this Petition). At that hearing the State abandoned the first ground for revoking the defendant's probation and relied solely on the ground that the defendant had failed to pay his fine and restitution. (A. 12). The defendant's sole defense was that he was indigent and totally unable to comply with the condition of his probation which required the payment of a fine and restitution. The defendant's defense relied on the Equal Protection Clause of the United States Constitution and was raised at oral argument at the close of the evidence. After hearing the evidence, the Court found that the defendant violated the condition of his probation by "failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically." (A. 42). On these two grounds the Court revoked the defendant's probation and sentenced the defendant to serve a term in the penitentiary. (A. 60-63).

The defendant exercised his right to appeal, and filed a timely appeal with the Court of Appeals of Georgia. The defendant raised two basic issues. First, the defendant reasserted his contentions based on the Equal Protection Clause and second, the defendant contended that his probation could not be revoked for failure to report to his probation officer since that ground did not appear in the petition to revoke his probation.

The Court of Appeals, relying on prior decisions by the Georgia Supreme Court, held that it is not a violation of the Equal Protection Clause to revoke an indigent's probation for the failure to pay his fine. (A. 65-68). The Court of Appeals upheld the revocation of the defendant's probation solely on the ground that he failed to pay his fine and restitution. (A. 65-68).

The defendant filed with the Court of Appeals a timely motion to reconsider which was denied. (A. 69). A timely petition for certiorari was then filed with the Georgia Supreme Court and that petition was denied. (A. 70).

REASONS FOR GRANTING WRIT

1. The Supreme Court of Georgia and the Court of Appeals for the 11th Circuit are in conflict on the issue presented.

In the cases of Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974), and Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975), the Georgia Supreme Court held that there is no violation of the Equal Protection Clause when an indigent's probation is revoked for failure to pay a fine. Subsequently, the United States Court of Appeals for the Fifth Circuit considered this issue in a habeas corpus proceeding in the case of Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977), vacated as moot, 439 U.S. 1041 (1978). The Fifth Circuit held that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws." Id., at 554. The cases decided by the Fifth Circuit have been adopted as precedent by the Eleventh Circuit.

After the decision by the Fifth Circuit the Georgia Supreme Court reconsidered its position in the case of Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281 (1978). Again, the Georgia Supreme Court held there was no violation of Equal Protection. With respect to the decision of the Fifth Circuit the Court stated that "it is obvious that Barnett v. Hopper misinterprets the U. S. Supreme Court's opinions and should not be applied here." Id., at 215, 239 S.E.2d at 792.

2. This Court previously granted a writ of certiorari to consider this issue but left the issue unresolved.

In the case of Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1007 (1981), this Court granted a writ of certiorari to consider "whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines." Id., at _____, 101 S.Ct. at 1100. However, in that case this court found that there was a possible conflict of interest in behalf of the petitioner's counsel and remanded the case to the lower court for further findings concerning a possible due process violation, without deciding the issue presented.

It appears that this Court would find that the Georgia Appellate Courts are in error in their interpretation of the Equal Protection Clause. Justice White in his dissenting opinion in Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1007 (1981), held that the revocation of the petitioner's probation for the failure to pay the fine violated the Equal Protection Clause. In the concurring and dissenting opinion of Justice Brennan and Justice Marshall it is stated that they would reverse the lower Court and dispose of the case because "as Justice White concludes,... Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), compels that conclusion." Id., at _____, 101 S.Ct. at 1105.

3. The decisions of the Georgia Supreme Court and the decision by the Court of Appeals of Georgia appear to be in conflict with the principals enumerated in prior cases decided by this Court.

The petitioner, Danny Bearden, asserts that it was solely because of his indigency that his probation was revoked and he was sentenced to the term in the penitentiary. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Griffin v. Illinois, 351 U.S. 12,17 (1956). On that principal this Court considered "whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence." Williams v. Illinois, 399 U.S. 235, 236 (1970). In Williams the defendant was sentenced to the maximum term provided by statute and was also fined $500.00 and $5.00 court costs. The defendant was incarcerated after he served the full term of his sentence to "work off" his fine. This Court held that once a state defines the outer limit of incarceration necessary to satisfy its penological interest, it cannot then subject a person to incarceration beyond that limit because of his indigency.

In the case of Tate v. Short, 401 U.S. 395 (1971), the defendant was imprisoned for his failure to pay fines imposed for traffic offenses. The Court held that no penal objective of the State was achieved by imprisonment since Texas did not legislate a prison term for traffic offenses. It was held that it is a violation of the Equal Protection Clause to convert a fine into a prison sentence.

Although it may be permissible for a State to impose a jail term upon an indigent in lieu of a fine "the State must make clear that the specified jail term in such circumstances is essentially a substitute for the fine and serves the same purpose of enforcing the particular statute that the defendant violated." Wood v. Georgia, 450 U.S. 261, _____, 101 S.Ct. at 1111 (1981) (Justice White dissenting). In the present case it is clear that no calculation of the type suggested by Justice White was made.

When the petitioner, Danny Bearden, was sentenced it was the determination of the Court that the penal interests of the State would be satisfied if the petitioner were to serve a total of three (3) years on probation. (A. 52, 56). There were several conditions imposed upon his probation which were also apparently necessary

to satisfy penological interests of the state. At the time the petitioner was sentenced he was apparently employed, (A. 22, 23), and the Court found it necessary to impose a fine and restitution, part of which was to be paid immediately, and the remaining portion to be paid in the future. At the time of the revocation of the petitioner's probation the court initially imposed a sentence of 5 years in the penitentiary, (A. 62, 63), beginning at the date of revocation.[1] Clearly, there was no determination by the trial court that the imposition of this longer sentence was necessary to achieve the penal interest the state supposedly had in the imposition of the fine.

In the case of San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), this Court stated that there would be a violation of Equal Protection if a class of individuals, who, "because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of meaningful opportunity to enjoy that benefit." Id., at 20. Under the present facts, the petitioner was unable to pay the amount required to retain his status as probationer under the First Offender's Act. This resulted in the loss of several substantial benefits. First, the petitioner lost his restricted and conditional liberty. Second, he lost his right to be completely exonerated of any criminal purpose upon the successful completion of his probationary period. Ga. Code Ann. § 27-2728. Third, he lost several of his civil rights including the right to vote, or hold office. Ga. Code Ann. § 2-501. Finally, he lost his rights regarding non-disqualification for employment as stated in Ga. Code Ann. § 27-2718.1.

---

1. When an individual whose probation is revoked under the Georgia First Offender's Act may, at the time of revocation, have any sentence imposed which may have originally been imposed. Ga. Code Ann. § 27-2727; Stephens v. State, 254 Ga. 835, S.E.2d (1980). In the present case the maximum term which could have been imposed was 20 years for the charge of burglary, Ga. Code Ann. § 26-1601, and 10 years for the charge of theft by receiving stolen property, Ga. Code Ann. § 26-1812. The only limitation is that defendant be properly informed of the effects of his first offender status under the guidelines set out in Stephens v. State, supra. In the present case the trial court, upon the defendant's motion, subsequently modified and reduced the sentence imposed because the requirements of Stephens v. State were not followed. (A. 64).

In summary this Court should grant a writ of certiorari to determine the issue presented because the State Court of last resort has decided a federal question in conflict with the Federal Court of Appeals, and in a way which conflicts with the principles enumerated in the applicable decisions of this Court. This is an important issue of federal law which has not been specifically decided by this Court, but should be.

Respectfully submitted,

HATFIELD, MCCOLPIN,
VAN CLEAVE & STULCE

BY: _____
Attorneys for Petitioner
428 McCallie Avenue
Chattanooga, Tennessee 37402
(615) 756-5880

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 6633

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DANNY R. BEARDEN

Petitioner

v.

STATE OF GEORGIA

Respondent

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

IN THE SUPERIOR COURT OF CATOOSA COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	NO. 8917 + 8923
VS.	:	
DANNY BEARDEN	:	Burglary
Defendant		OFFENSE CHARGED

ORDER APPOINTING COUNSEL

The above-named defendant having requested counsel and it appearing to the Court that the defendant is financially unable to employ counsel and is therefore an indigent,

IT IS ORDERED that JIM LOHR be and he is hereby appointed as counsel for the defendant in the Superior Court of Catoosa County, Georgia.

THIS 14th DAY OF May, 1981.

Filed in office
May 14, 1981
/s/ Norman L. Stone,
Clerk

D. B. [illegible]
JUDGE SUPERIOR COURT,
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT.

PETITION FOR REVOCATION OF PROBATION
DEPARTMENT OF CORRECTIONS/OFFENDER REHABILITATION

100 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30308

THE STATE

VS

Danny Ray Bearden

NO. 8923;8917 September TERM

19 80 Superior COURT

OF Catoosa COUNTY

Now comes D. L. Lomenick, District Attorney

, in the name and behalf of the State of Georgia, and
ngs this action against Danny Ray Bearden, hereinafter called the Defendant,
l shows:

I

hat the Defendant entered a plea of guilty to ~~[illegible]~~ the offense of Burglary and Theft by Receiving at the September Term,
0 .

II

at this Court, on the 8th day of October, 19 80 , did sentence the Defendant
rve as follows: Three years probation; one year concurrent; $500.00 fine and $250.00 restitution ($200.00 instanter and balance $550.00 on or before February 8, 1981).

III

at this Court, by proper order, however, permitted the Defendant to serve said sentence on probation, the and conditions of which are fully set forth in the copy of said sentence which is attached hereto, marked as it "A", and specifically incorporated herein.

IV

t the Defendant has violated the following terms and conditions of probation in the following particulars: nlawfully and without authority on the 10th day of May, 1981, enter the home of Lucy Haney, 103 on Road, in Ringgold, Catoosa County, Georgia, for the purpose of commiting a THEFT. Defendant lso failed and refused to pay fine and restitution balance of $550.00, which was to be paid on or e February 2, 1981.

V

REFORE, the State of Georgia prays that the citation for revocation of probation be served on the ant and that the Defendant be directed to appear before this Court on a day to be fixed by the Court and ime to show cause why probation should not be revoked.

27th day of April, 19 81

Ralph L. Van Pelt Jr

ORDER

laving read and considered the foregoing petition, it is hereby ordered that the Defendant be served with a
y of same and that the Defendant show cause before me on the 3rd day of June
81, at the Courthouse in Ringgold Georgia, at
1:00 P M. why said probation should not be revoked.

his 29TH day of MAY, 19 81.

Judge, Lookout Mountain Judicial Circuit

iled in office
ay 29, 1981
s/ Janice Benton,
Deputy Clerk

CERTIFICATE OF SERVICE

hereby certify that I have served a copy of the foregoing petition upon the Defendant in person (by
tered mail).

his 29th day of May, 19 81.

Lemuel C. Pippin
Asst. Sheriff, Catoosa Co.

IN THE SUPERIOR COURT OF CATOOSA COUNTY, GEORGIA

AT RINGGOLD

STATE OF GEORGIA,

Plaintiff,

-vs- CRIMINAL ACTION

DANNY BEARDEN, NOS. 8917 & 8923

Defendant.

APPEARANCES:

FOR THE STATE OF GEORGIA:

Ralph Van Pelt, Esq.,
Assistant District Attorney.

FOR THE DEFENDANT:

James H. Lohr, Esq., of
Hatfield, McColpin, Morgan,
Van Cleave & Stulce, Esqrs.,
416 Battlefield Parkway,
Fort Oglethorpe, Georgia 30741

June 3, 1981

TRANSCRIPT OF PROCEEDINGS

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BE IT REMEMBERED, the above-entitled cause came on for hearing on the 3rd day of June, 1981, before the Honorable Joseph E. Loggins, Judge of the Superior Courts, Lookout Mountain Judicial Circuit, when the following proceedings were had, and evidence introduced, to-wit:

MR. VAN PELT: This is a probation revocation, State versus Danny Bearden, in reference to No. 8917, felony indictment for burglary, 8923, a felony indictment for theft by receiving stolen property.

Mr. Bearden is being represented by Mr. Lohr in this case, Your Honor.

THE COURT: All right.

MR. LOHR: Your Honor, one preliminary matter, here. I talked with Mr. Van Pelt, and we're willing to stipulate that there has been fingerprints taken, and that there is alleged here that Mr. Bearden burglarized a trailer over on Garden Road in Ringgold. That's the basis, one of the basis for the revocation.

The results from these fingerprint analysis has not come back from the lab, and I would like to request this Court -- move this Court to continue this hearing until such time as we may get the report on the fingerprint analysis.

I have reason to believe that it may be

exculpatory in this matter.

THE COURT: When were the fingerprints sent to the Crime Laboratory?

MR. VAN PELT: It's been -- do you remember what day it was. Ken took those down there, Chief? It's been a couple of three weeks, Your Honor.

What was sent were copies of Mr. Bearden's prints and some items from the trailer that were sent. That may or may not be dispositive.

It's entirely possible that they wouldn't be able to lift a latent print from any of the items that were sent. We have some --

THE COURT: (Interposing) Are you relying upon the results of the test as to that alleged crime?

MR. VAN PELT: No, sir, not at this hearing. We're not relying on them for the basis of the revocation, no, sir.

MR. LOHR: Your Honor, I think it's pretty well established the identity of three individuals that were in that trailer. The fourth individual, I think, the dispute is over. The dispute is over who the fourth individual was in that trailer.

It would be conflicting testimony on that matter.

The reason I'm interested in those prints is to find out if in fact there are prints from the fourth

person, not the three that I believe will be established as being in that trailer, and whether or not the prints from those -- that fourth person would be Danny Bearden or some other individual. But, at this point --

THE COURT: (Interposing) But, supposing, Mr. Lohr, it comes back that there were 15 other people in that trailer, none of whom were the defendant in the case.

Are you saying that that would be the defense in the case, that this defendant didn't enter the trailer?

MR. LOHR: Yes, yes, that is the defense, Your Honor.

THE COURT: You're saying, if the defendant did in fact enter the trailer, then his fingerprints would be in the trailer on these items that were dusted, and the fingerprints taken?

MR. LOHR: I'm not saying that if he was in the trailer not necessarily will his fingerprints show. I agree to that point. The point is there may be prints of a fourth individual, I believe it will be established probably that there were four individuals in that trailer, three individuals I think the identity will not be in dispute, the fourth individual -- Mr. Bearden is accused of being that fourth individual.

The defense, I believe, he was not in the trailer, and if in fact there are prints from another individual, not these three, and not Mr. Bearden, I believe that establishes, tends to establish that Mr. Bearden was, in fact, not in the trailer.

I would just like to see the results of this test before we go on with this hearing. That's basically --

MR. VAN PELT: (Interposing) Your Honor, we have a second ground alleged in addition to the burglary.

THE COURT: I understand that, but let's stay on the fingerprint subject for the time being.

I may be wrong, but I've known a lot of cases where the defendant did in fact enter the building, but his fingerprints couldn't be found in that building.

Now, Mr. Lohr, as to these other three defendants, you say there's no question as to the identity of those three? Is that based upon fingerprints?

MR. LOHR: Well, to my knowledge, not at this point.

I believe, this is just based upon my investigation up to this point, what I believe to be. I think that's important evidence, the fingerprints.

THE COURT: I think it's important evidence if in fact they have fingerprints.

What you're -- what seems to me that your

argument is the negative, and that is that if there are no fingerprints found inside the trailer, then the defendant wasn't in that trailer, and your theory is, that if, if the defendant entered the trailer, then his fingerprints would have been found, and the Crime Lab report would show that it was his fingerprints; is that right?

MR. LOHR: No. I can -- my theory is that there were four people in the trailer, Mr. Bearden was not one of them.

I wouldn't be surprised if the Crime Lab showed prints from four individuals, and that Mr. Bearden's prints will not be among those.

You see, it's the fact that there were four individuals, that there are four different sets of prints that show up, and none of those are Mr. Bearden's, and I think if that were established, that would be exculpatory in this matter.

THE COURT: I think it would be exculpatory and it could be used, but unless the State is relying on, as a part of their case here, on the fingerprints to go forward with this case, then I don't see how a continuance is necessary in this case.

MR. LOHR: It's just evidence that we don't have at this time, Your Honor. We're not able to obtain

at this time, which we would be able to obtain upon request once the State receives the results from this lab test.

I would very much like to have that evidence available before we go ahead with this, at least this portion of the hearing.

THE COURT: If Mr. Van Pelt has stated that he is not relying on that evidence at all in this hearing, then how would it be material to this hearing if there's no evidence submitted on that point?

MR. LOHR: We have a defense to put on. It could very well be that we would want to use that evidence in the defense.

THE COURT: As to this hearing?

MR. LOHR: As to this hearing.

THE COURT: If Mr. Van Pelt is not going to use it, how can you use it as a defense?

MR. LOHR: Can't I subpoena the individuals from the Crime Lab?

THE COURT: You can anybody you want to.

MR. LOHR: I mean, that would be, that would be what I intend to do if in fact it was favorable for the defendant.

THE COURT: In any event, the Court is going to deny your request for a continuance.

Now, at such time as the State attempts in any way to use this alleged burglary for which the fingerprints would be important to you, then the Court will take it under consideration again, and might change the ruling.

MR. LOHR: With respect to this particular hearing? I understand, if I understand you correctly, that if the State relies on the basis of the burglary for the revocation, that at that time the Court will --

THE COURT: (Interposing) I will reconsider it, yes, sir.

MR. LOHR: Okay. Thank you.

MR. VAN PELT: Very well. We'll, Your Honor, in that case, we'll confine ourselves to the second ground of the revocation.

THE COURT: All right.

MR. VAN PELT: Okay. First, Your Honor, I would like to submit -- the first piece of evidence I would like to submit, S-1. It's already marked as S-1.

THE COURT: Have you shown it to defense counsel?

MR. VAN PELT: Yes, Your Honor, that's a certified copy of plea and sentence in both cases, and I believe the, the Clerk's copy of the petition shows the defendant was served with a copy of those along with a copy of the petition.

MR. LOHR: No objection.

THE COURT: All right. Let State's Exhibit 1 be admitted.

(Whereupon, the document referred to above as State's Exhibit No. 1 was received into evidence.)

MR. VAN PELT: Your Honor, I would like to call to the Court's attention that both of these are first offender sentences in both cases.

THE COURT: All right. Proceed.

MR. VAN PELT: State would call Mr. Mullis. Would you raise your right hand. Do you swear that the testimony you are about to give in this case before the Court is the truth, the whole truth and nothing but the truth, so help you God?

JACK MULLIS,

called as a witness at the instance of the State of Georgia, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VAN PELT:

Q For the record, would you state your full name and how you are employed?

A I'm Jack Mullis, and I'm the Probation Officer for the Lookout Mountain Judicial Circuit.

Q And then, what are your duties with the Probation

Office?

A Duties for the Probation Office is to supervise and collect fines and restitutions that a person is ordered to pay through our office.

Q Do you supervise and collect fines?

A Yes, sir.

Q And supervise the collection of fines in Catoosa County?

A Yes, sir.

Q And in particular, do you supervise Danny Bearden?

A Danny Bearden is on my case load, yes.

Q And pursuant to a sentence of the Court in this case, do you have any knowledge as to whether or not Mr. Bearden was ordered to pay a fine?

A Yes. He was ordered to pay a fine.

Q Do you know how much the amount of that fine was in each of the cases?

A He paid, it was $500 fine, and $200 -- $250 restitution, and he was ordered by the Court to pay a $200 instanter, which he did, and that's all he's paid, and he was to have this paid by February the 8th, 1981.

Q Okay. So, to your knowledge, and as far as you know, what the records of the Clerk of the Court reflect is that --

A (Interposing) He has not paid that.

Q (Continuing) -- he has not paid. He has paid $200?

A Yes.

Q But, has not paid anything above and beyond that?

A No.

Q Have you ever had any contact with Mr. Bearden regarding his --

A (Interposing) I'm sure that he has written letters, because we get out letters every so often about the fine and restitution and stuff like that.

Q Has he contacted you in any effort to explain why he has not been able to pay the fine?

A I don't know of any time that he has.

Q To your knowledge?

A To my knowledge.

Q To your knowledge. Do you have any knowledge of whether or not he's contacted anyone in your office?

A No, I don't. All I know is, what I can tell is that anyone that is ordered by the Judge to pay a restitution and a fine by a certain date, after that date we're -- we can issue a warrant after that date because they have been given plenty of ample time to pay that.

Q Okay. What time is reflected on the documents there in front of you? When was Mr. Bearden to have completed paying his fine by?

A He was to have completed that by February the 8th, 1981.

Q And today's date is June the 3rd?

A This is June, so he's had plenty of time to pay it. Whether we -- whether we get in touch with them or write them or anything else about their fine, they know that, it is explained to them when they're put on probation when the fine is due, and that's when it's to be paid, on or before that time, and we usually give them a little extra time to, you know, pay it on time.

Q Do you know if Mr. Bearden was aware that you were his probation officer?

A Yes. When he's written up and put on probation, they are explained, these rules, by the probation officer.

Q Okay.

MR. VAN PELT: No further questions.

THE COURT: Mr. Lohr?

CROSS EXAMINATION

BY MR. LOHR:

Q You say that $200 was paid, was paid immediately?

A Yes.

Q Do you know who paid that amount?

A No, I don't. The Clerk's Office gets a receipt for it, and it's attached to the case. The receipt is attached to the case.

Q In fact, wasn't the Court order that Mr. Bearden pay $100 immediately, and $100 on the next day?

A Well, I don't know till I review this thing. It could have been. I have so many. I couldn't tell you exactly. It could have been that way.

Q Sentence was entered on the 8th day of October; is that correct?

A October the 8th, 1980, was when the sentence was. Three years probation, one year concurrent, five hundred dollar fine, $250 restitution, a $200 instanter, and a balance $550 on or before February the 8th.

Now, I don't have a copy of the sentence here, but whatever the sentence reads, that's the way it is.

MR. LOHR: And, Your Honor, for the record, I would like to state that my copy of the sentence on Case No. 8917 states, defendant shall pay $100 of said fine instanter, and $100 of said fine on or before October 9, 1980.

THE COURT: All right. So noted. Proceed.

BY MR. LOHR:

Q You say that your office has sent letters to Mr. Bearden?

A I said it's the usual procedure that we do.

Q Do you know whether or not --

A (Interposing) No, I don't right offhand know whether I sent him a letter or not, but it's our procedure that we do.

Q Do you know whether or not -- or, excuse me -- have you had any personal contact with Mr. Bearden since October 9?

A Probably. I don't have my case -- my book with me, but probably I have, because I usually get in touch with him.

Q In fact, you cannot testify positively that you have notified Mr. Bearden?

A No. I couldn't tell you positively. I do know that he knew that he owed the fine.

Q And to your knowledge, Mr. Bearden has not contacted you or your office during this period?

A To my knowledge. I'm not saying he hasn't. He might have called and the secretary might have talked to him or something.

Q Did you issue a warrant for his arrest for violation of the probation?

A Failure to pay, yes.

Q When was that warrant issued?

A Tenth day of May, 1981. No, nineteen -- right offhand, I don't know, I would have to see the warrant. I can't recollect when I issued -- I don't have the warrant here.

Q Was the basis for that --

A (Interposing) But, I give him ample time, I always do, and I issued the warrant for failure to pay as directed

by the Court.

Now, that was after February the 8th, 1981.

Q And you did issue a warrant on that basis?

A Yes.

MR. LOHR: I have no further questions at this time.

THE COURT: All right. Anything further, Mr. Van Pelt?

REDIRECT EXAMINATION

BY MR. VAN PELT:

Q Okay. Mr. Mullis, the dates Mr. Lohr was talking about there in the sentence, he's talking about October 8th, then October 9th, when the second $100 was paid. That's the very next day?

A Oh, yeah.

Q That was to be paid, and he did pay the second $100?

A Yeah, he paid that. He paid $200.

Q And he's not paid anything since?

A No, nothing since.

Q And to your knowledge, that's what's reflected in the record of the Clerk of the Court?

A Yes.

MR. VAN PELT: No further questions.

THE COURT: All right, sir, you can step down.

MR. LOHR: Just one question, Your Honor.

RECROSS EXAMINATION

BY MR. LOHR:

Q Do you know whether Danny Bearden or some other person paid this $200?

A No, I don't. I don't know who paid it.

THE COURT: All right. Step down.

(Witness excused.)

THE COURT: Anything further from the State?

MR. VAN PELT: No, Your Honor.

THE COURT: Mr. Lohr?

MR. LOHR: Your Honor, at this time I would like to call Mrs. Jean Bearden.

THE COURT: Are there any other witnesses other than the defendant himself? He may or may not testify. Do you have any other witnesses here, Mr. Lohr, to testify?

MR. LOHR: I have some, but the only other witnesses I have would go to the burglary charge which I understand that the State has --

THE COURT: (Interposing) Gentlemen, let me say this, there was no request for the rule of sequestration to be invoked.

MR. VAN PELT: No, sir.

MR. LOHR: Did not request.

THE COURT: I don't plan to make a practice of

calling witnesses from the courtroom to testify, but inasmuch as the rule was not asked for and invoked in this hearing, witnesses may appear that have sat here and listened to this testimony.

But, I don't plan to make a practice of permitting witnesses to testify who have sat in the courtroom and heard other testimony. So, just keep that in mind.

Go ahead and take the witness stand.

MR. LOHR: Raise your right hand, please.

THE COURT: I think they do it on television, don't they, just call them out of the audience and say, come on up here and testify, but we're not on TV, I hope.

MR. LOHR: Do you swear this testimony -- evidence that you give in this case will be the truth, the whole truth and nothing but the truth?

Please be seated.

JEAN LILLIAN BEARDEN,

called as a witness at the instance of the defendant, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOHR:

Q Would you please state your name for the Court, please?

A Jean Lillian Bearden.

Q And how are you related to the defendant, Danny Bearden?

A I'm his wife.

Q Mrs. Bearden, have you and Mr. Bearden been living together and residing together since October of last year?

A We did up until January.

Q And has your husband, Mr. Bearden, been employed during that period of time?

A No, sir, he couldn't find no job.

Q Do you and Mr. Bearden own any property jointly?

A No, sir.

Q Does Mr. Bearden own any property to your knowledge?

A None as I know of.

Q Has Mr. Bearden been able to make any payment on the fine or restitution other than the $200 which was paid?

A No, sir. He was working at Rockwell International. He got laid off, and he hasn't been able to find a job since then.

Q To your knowledge, has he attempted to find a job?

A Yes. I have took him to look for jobs myself. I took him to Dalton Unemployment Office, and they didn't have nothing, and he went to look for different jobs. He has been everywhere in Ringgold to find a job, and nobody's hiring.

MR. LOHR: No further questions.

THE COURT: All right. Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q When was he laid off from Rockwell?

A It was in November, I believe.

Q November?

A Uh-huh.

Q Last year?

A Yes, sir.

Q Okay. Now, he was -- you all were married back in October, 1980?

A No. We've been married since August of '76.

Q August of '76?

A Uh-huh.

Q And you knew about when Mr. Bearden came to court on these charges in October?

A Uh-huh. I was with him then.

Q And you knew he had -- part of his sentence there was that he had to pay a fine?

A Yes, sir.

Q And you knew that?

A Yes, sir.

Q And you knew, also knew that he had a certain amount of time to pay it in; isn't that true?

A The only thing that his papers said when we got it was

he had to pay $500. It didn't say what date or nothing on it.

Q You never -- what papers?

A His probation papers.

Q Probation papers?

A Uh-huh.

Q You're saying didn't have --

A (Interposing) No definite time on it, just said pay $500.

Q Okay. And you're saying that he's attempted to find work since?

A Yes, sir.

Q He was laid off by Rockwell?

A Yes, sir.

Q Did you try and -- have you gotten in touch with anybody in the Probation Office to tell them that he was making an effort to get some money up?

A No, sir. He has been down there a couple of times, and he told them then that he hadn't had no job, but he was looking for one.

Q Where is -- where has he looked?

A He's looked in Dalton, all over Dalton carpet mills down there. He went to Babb Lumber Company, Salem Carpet, Dixie Yarn, every place in Ringgold he could think of to go to, but he still hasn't found one.

Q Are you all living together now?
A Not since he's been picked up.
Q I mean before he was arrested?
A No.
Q You weren't?
A No.
Q Were you in the process of getting a divorce?
A No, sir. We was in the process of getting back together till they come picked him up again.
Q I see. The amount that Mr. Bearden paid when he was sentenced back in October, do you know where he got that money?
A Yes, sir. He borrowed it from his mother and father.
Q Has he made any attempts to get any more money from --
A (Interposing) They're like us. They don't have the money either. His father is a retired veteran. He's disabled, and his mother, she has to stay home and take care of him.
Q How does Mr. Bearden get around? Do you all have a car?
A They have a truck.
Q Who's they?
A His mother and father.
Q Does he use it?
A Yes, sir.

Q Does he have any other way of getting to work?

A No, sir.

Q When you all were living together, where did you live? With his parents?

A No, with my mother and father.

Q Your mother and father?

A Uh-huh.

Q Okay.

MR. VAN PELT: I don't have anything further, Judge.

THE COURT: Anything further, Mr. Lohr?

MR. LOHR: Not of this witness, Your Honor.

THE COURT: All right. You can step down.

(Witness excused.)

MR. LOHR: Your Honor, at this time, we would call Mr. Bearden.

Will you raise your right hand, please?

Do you swear that the testimony that you give in this case will be the truth, the whole truth and nothing but the truth? Please be seated.

DANNY BEARDEN,

a defendant, called as a witness in his own behalf, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOHR:

Q Will you state your name for the Court?

A Danny Bearden.

Q And Mr. Bearden, referring to the sentence and the order to pay the fine on that first offender, first offender act, how much has been paid toward that?

A Two hundred dollars.

Q And who paid that $200?

A My mother and father.

Q And have you made any payment since that time?

A No, sir.

Q Why not?

A Cause I haven't had a job.

Q And what efforts have you made? Would you just please tell the Court what efforts you've made to try and find a job?

A A lot. I've walked a lot, too, to find one, and then my mother and dad came to Dalton out at Textile Rubber, and --

Q (Interposing) What places have you applied at?

A Textile Rubber and Con Agra, and over at the high school, I tried over there.

Q Which high school is that?

A One on the main drag there in Dalton at the end of Dalton.

Q And have you applied for any jobs in this area,

Ringgold?

A Yes, sir.

Q Where?

A Salem Carpet. They wouldn't even let me in the gate over there, just said they wasn't doing no hiring.

Q Any other places?

A Yes, sir. I went over here at Georgia Unemployment Office, and they didn't have any -- they told me to come back in a couple of weeks.

Q And have you received an offer for employment from any of these?

A No, sir.

Q Places that you've applied?

A I've called Textile Rubber every day.

Q And what has been the result of your contact with the Unemployment Office?

A Don't need nobody.

Q Have you been receiving any unemployment checks?

A No, sir.

Q Have you been receiving any income whatsoever?

A No, sir.

Q Where have you been living since -- from the time, from October of last year until you were arrested?

A At my mother's.

Q Do you own any property? Automobile?

A No, sir.

Q Land?

A No, sir.

Q Anything of any value?

A No, sir.

Q Mr. Bearden, is there any way that you can pay this fine -- that you could have paid this fine in the past?

A No, sir.

Q Have you attempted to contact the Probation Officer or his office with respect to this matter?

A I've called the secretary, and she said that he was out in Trenton.

Q Did you leave a message?

A I told them that I was going to be late, I'm trying to find a job and get a payment up.

Q And what was their response?

A They said we would tell them.

Q Have you received any letters or any other contact from the Probation Office?

A No, sir.

Q Not received any letters?

A No, sir.

Q Have you spoken with Mr. Mullis since the date of your sentence on October 8th, 1980?

A I've been in his office once down there when I was in

LaFayette.

Q Excuse me?

A I went in his office in LaFayette down there. It was, I think, a week after that when I got put on probation, I was supposed to went down there and got my papers and everything.

Q Did you receive your papers?

A Yes, sir.

Q Was it explained to you when and how you were to make your payments?

A Well, I can't read, and I can't hardly see. So, my wife read them to me.

MR. LOHR: I have no further questions.

THE COURT: Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q Thank you. Mr. Bearden, back in October, Judge Coker read, pronounced sentence he was imposing on you, didn't he?

A Yes, sir.

Q And he told you that you were going to have to pay a $100 that day, and $200 by the next day?

A Yes, sir.

Q And he also told you you were going to have to pay the rest of it within four months?

A Yes, sir.

Q You were represented by Mel Phillips then, weren't you?

A Yeah.

Q All right. Now, when you went to see Mr. Mullis to get your papers down there, were you -- and at the time the sentence was imposed -- were you employed then?

A No, sir.

Q Where were you living then?

A At my mother-in-law's.

Q Where were you living before you were arrested on this probation warrant?

A At my mother's.

Q At your mother's?

A Yes, sir.

Q And how long have you been living with your mother?

A With my mother?

Q Right.

A I don't know, about six months.

Q Six months?

A Yeah. Maybe less.

Q When did you move from your mother-in-law's to your mother's?

A When me and my wife separated.

Q And when was that?

A I don't know, really. I don't know what date it was.

Q Can you guess about how many months ago it was?

A Four, maybe five.

Q Four or five months ago?

A (Witness nods head up and down.)

Q Which would make it about January, end of January, early February?

A It was at the last of the month.

Q End of January or end of February?

A I don't know.

Q Now, you mentioned about five places you went hunting for work, that's five places in the last, let's see, five, eight months?

A No, sir. I went other places. I called Rockwell about -- they sent me a letter.

Q What did they say?

A To put my application in back up there in case they started rehiring.

Q All right. And you went to Conger (phonetically)? What was that?

A Joe Willard.

Q One of the other places you mentioned, what was it, Conger?

A Con Agra.

Q Con Agra. Where are they at?

A Dalton.

Q Dalton. And you went to the Dalton High School?

A Yes, sir. I went to Khyo, too.

Q Went to where?

A Kayo on 41.

Q Who did you talk to at the Dalton High School?

A It was the superintendent.

Q Superintendent?

A Yes, sir.

Q Who did you talk to at Salem?

A I never did get in Salem. They wouldn't let me in. They wasn't taking no applications. They wasn't doing any hiring.

Q How many times have you been to the Unemployment Office?

A I went twice in one day.

Q When was that?

A About the 4th of this month.

Q When you entered your plea before Judge Coker, you knew you were going to have to pay that money, didn't you?

A Yes, sir.

Q You agreed to pay it?

A Yes, sir.

Q Did you have any intention of paying?

A Yes, sir. I was going to pay it.

Q Have you made any effort to contact Mr. Mullis since February, since the time you had ran out, to tell him?

A Well, the day when it ran out is the day when I called down there.

Q It was. And you talked to the secretary?
A Yes, sir.
Q And she said he was in Trenton?
A She said she would get in touch with him. I might have assumed he was in Trenton because they was having court down there.
Q How did you know that?
A Because I just left Trenton.
Q Pardon?
A I just left Trenton.
Q You had just left Trenton. And then, you didn't make any other effort to get in touch with him?
A No, sir.
Q He told you when you got your papers that he was over here every Wednesday, didn't he?
A Yes, sir.
Q Did you come -- have you ever been by the courthouse since that phone call in February to try and get in touch with him?
A No, sir.
Q Not made any attempt to come by here?
A No, sir.
Q On any other Wednesday he's here?
A No, sir.
Q And he's here every Wednesday?

A I understood that Mr. Snow was down here, too, on Wednesday.

Q Right. Mr. Snow or Mr. Mullis or someone from the Probation Office is here in the courthouse, they told you that, didn't they?

A Yes, sir.

Q And you didn't attempt to come by the courthouse and find any of them?

A No, sir.

Q How do you survive, Mr. Bearden?

A I stay with my mother and them.

Q And they feed you?

A Till I find a job.

Q How long, just how long have you been unemployed?

A Since I got laid off at Rockwell.

Q When was that again?

A About -- it was in November, it was right before Christmas.

Q Of nineteen . . .

A Eighty.

Q Have you been through high school?

A No, sir.

Q What was the last grade you attended?

A Ninth.

Q Okay. Are you disabled in any way?

A No, sir.

MR. VAN PELT: No further questions, Your Honor.

THE COURT: All right. Anything further, Mr. Lohr?

REDIRECT EXAMINATION

BY MR. LOHR:

Q Mr. Bearden, have you been able to afford to hire a lawyer to represent you?

A No, sir.

Q Have I been appointed by the Court?

A Yes, sir.

THE COURT: You may step down.

THE WITNESS: Okay.

(Witness excused.)

THE COURT: Anything further?

MR. LOHR: No further witnesses, Your Honor.

THE COURT: Anything in rebuttal?

MR. VAN PELT: Nothing, Your Honor.

MR. LOHR: Your Honor, I just would like to bring a couple of things to the Court's attention before --

THE COURT: (Interposing) Something that's been presented?

MR. LOHR: Just argument. That's all.

THE COURT: I'll hear from you very, very briefly, but it will be briefly.

(Whereupon, counsel for the State of Georgia and counsel for the defendant made closing statements to the Court.)

THE COURT: Of course, Mr. Bearden and Mr. Lohr, it's not my desire to revoke your probation. These matters, so far as I am concerned, are the worst part of my job.

Certainly $550 or $5,500 doesn't necessarily mean the difference between you serving a sentence in prison or being on probation, except this Court previously on October the 8th, 1980, ordered these payments to be made as a condition of your probation.

Now, I know that a lot of times it's hard to find work, and I know that there are times when a person really and truly tries, tried hard, and they can't find the type work that they want, or sometimes they can't find any regular work, but yet, almost daily, people go down to the courthouse in Chattooga County, and I'm sure it's true in this county, looking for somebody to do some work for them, maybe mow their grass, maybe do an odd job for which they would pay them some money. They can't find anybody to work. I don't know where those people are looking for work when people who are looking for somebody to work for them.

I'm assuming in this case that one of the conditions of probation was that the defendant report to the Probation Office periodically.

MR. VAN PELT: Yes, sir. That's in the -- in S-1.

THE COURT: In S-1.

MR. VAN PELT: I believe it is. It's the same as on the other one. I may be wrong.

THE COURT: I don't see the condition in this sentence requiring this defendant to report to the probation officer every 30 days, but I believe the testimony of the probation officer was that the terms of the condition of probation were explained to him. Is that the testimony or not?

MR. VAN PELT: Yes, sir, I believe it was.

THE COURT: If there is any dispute about it, we can go back on the record and find out what the testimony was. I don't feel that this defendant has really in good faith reported to the probation officer on any type of regular basis.

Mr. Mullis testified in general terms as to what is generally explained to people on probation, and as I recall it, that this defendant was informed of that. Was that the testimony or not?

MR. LOHR: Your Honor, as I remember it, I'm

just -- from what I'm trying to recollect, that he generally said that the terms of probation were explained, but he did not go into any detail except with respect to the amount of the fine, and the aspect of reporting to the probation officer.

I don't think there was any testimony that that was one of the conditions of probation, nor that that particular part had been explained to him. I don't remember. I'm just trying to go back and remember.

THE COURT: But, the defendant himself testified that he was given some papers, and that his wife read them to him. Is that not right?

MR. LOHR: I believe that was his testimony.

MR. VAN PELT: Yes, sir. We don't have those papers in evidence. I don't know what the contents of them were. I don't know which papers they were.

Your Honor, I believe that there was testimony from Mr. Mullis that Mr. Bearden was written up at the time of the sentence. I don't believe there was any specific date for reporting testified to.

THE COURT: I know that usually, quote, the papers, end of quote, that are given, usually contain those provisions that they're to report, I believe, every 30 days, but I'm not sure.

Mr. Mullis, would you come back to the witness

stand, please?

JACK MULLIS,

recalled as a witness at the instance of the State of Georgia, being previously duly sworn, was examined and testified further as follows:

MR. MULLIS: Your Honor, I might clear this up to say, now, he mentioned Mr. Snow. Mr. Snow might have written him up, I don't know, because we both serve this county, but usually everybody that's put on probation, Judge Coker several years ago fixed out some rules of probation, and asked us to read these rules to everybody that's put on probation, which I do.

THE COURT: Do you have a copy of the rules that are given to each person that's put on probation?

MR. MULLIS: Yes, sir.

THE COURT: Do you have a copy of that?

MR. MULLIS: Yes, sir.

THE COURT: Would you get a copy of it?

MR. MULLIS: I sure will.

THE COURT: I reiterate, I don't know what's in probation, but if the prior orders of the Court aren't enforced, then I don't know any other way to do it, if they're not complied with, I don't know any other way, Mr. Lohr.

MR. LOHR: Your Honor, I have been in -- since

I've been involved with this case, I've been in contact with his family and his brother has told me he would do everything possible to get this amount.

THE COURT: Beg your pardon?

MR. LOHR: His brother has told me that he will do whatever he can to get this $550 to pay it for Danny.

Now, when I spoke with him before today, he indicated he would try to have it today, subsequently found out he was not able to obtain it, and it might be possible that this Court would consider giving Mr. Bearden or his family some time, I don't know how much it would take, a few days, in which to pay this off.

There's no dispute that he has not paid it, and did let it slide, but he's willing to pay it, and his family is willing to pay it as soon as they can get the money.

THE COURT: That's well and good, Mr. Lohr, but, of course, the fallacy in that argument is, since October the 8th, 1980, this defendant has known that on or before February the 8th, he was required to pay this.

I know, and I hate to see $550 or the lack of $550, put this boy in prison. I hate to see anybody

go to prison when the jury finds them guilty of armed robbery, I hate to see them go to prison, but those are the laws that you're bound by. I'm bound by the same laws.

So, Mr. Bearden, we all live by laws and not of men, and I don't know any way to enforce the prior orders of the Court but one way.

MR. LOHR: Well, I guess my only response to that, Your Honor, would be that the law requiring revocation of probation when an indigent is unable to pay a fine is an invalid law.

THE COURT: I'm well aware of the indigency provision, and I know that there are times when a person doesn't have funds that he's supposed to have, but in any event, the Court finds that this defendant has failed to abide by the previous order of this Court of Judge Coker on October the 8th, 1980, in failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically.

That's the order of the Court.

MR. VAN PELT: Thank you, Your Honor.

THE COURT: Mr. Bearden, I'm sure, or at least I feel confident that Judge Coker explained to you, and probably Mr. Phillips explained to you at the time

Judge Coker imposed this first offender's sentence, what it meant.

Do you care to respond to that, Mr. Lohr?

MR. LOHR: Your Honor, I don't know what Mr. Coker has stated and -- excuse me -- Judge Coker and Mr. Phillips.

I have conferred with Danny, and I told him that as it stands as if he was at the day of his plea, that this Court would sentence him at this time.

THE COURT: Of course, you weren't here and you don't know what was explained to Mr. Bearden at the time of the sentence.

MR. LOHR: Right.

THE COURT: Now, if in fact, if in fact under the case of Stevens versus the State at 245 Georgia Reports, page 835 -- would someone go to the library, the law library, here, and get 245 Georgia Reports, under the case of Stevens versus the State -- unless it was clearly explained to Mr. Bearden that in the event the provisions of this probation were not complied with, that he could be sentenced in the burglary case anywhere from 1 to 20 years, and in the theft by receiving, anywhere from 1 to 10 years, if that was not explained to him by Judge Coker at the time, or written into the sentence at that time, then, of course, the

only period of time by which this Court can now revoke the probation would be the remaining portion. He was given three years sentence on October the 8th, 1980.

Are you familiar with the Stevens case, Mr. Lohr?

MR. LOHR: Your Honor, I'm not. What is the page number?

THE COURT: 835. 245 Georgia Reports, page 835. Our Supreme Court has held that the purpose of the first offender's act is to give the defendant another chance to speak.

In the Stevens case, the judge, the sentencing judge, told the defendant that if he brought -- if he violated a term of probation, that he would have to serve the remainder of the sentence if he was brought back into court for violation of the terms of the probation.

All right. Mr. Stevens was in fact brought back into court and resentenced and given a longer sentence than the remainder of his original term of sentence, and our Supreme Court has said, you can't do that.

But, if in fact in this case Mr. Bearden was informed by the Court that if he violated the terms of the first offender's act and was brought back into court, the Court at the time Mr. Bearden was brought back could impose a sentence in the burglary case

anywhere from 1 to 20 years, and in the theft by receiving case, anywhere from 1 to 10 years, then, of course, this Court at this time could impose a longer sentence than a period from October the 8th up to the present time.

But, I want to make it clear that between October the 8th, 1980, and up to this date, Mr. Bearden will be given credit for that period of time serving that sentence.

Am I making myself clear or am I confusing you more?

MR. LOHR: No. I understand exactly what you're saying, I believe.

THE COURT: Mr. Lohr, on behalf of the defendant, do you care to confer with the defendant and then respond, or would you prefer that I have the record checked to determine what information and what statements were made to Mr. Bearden at the time he was sentenced?

MR. LOHR: Your Honor, let me confer with him and see if he recalls what is said.

THE COURT: All right. There is a record of it because at the time Mr. Bearden entered his first offender's plea in each of these cases on October the 8th, 1980, there will be a record of it, and we can

get it. I don't know which reporter it would have been, but we can get it.

MR. LOHR: Give me just a moment, if you would, please.

THE COURT: All right, sir.

MR. LOHR: Your Honor, I suppose the only way to be sure is to check the record on it. He does not remember what Judge Coker told him specifically which I can, of course, understand, but he cannot testify one way or the other.

THE COURT: All right. The Court at this time then will impose a sentence which will be the sentence that will stand in the event the Judge at that time, Judge Coker, made the proper explanation to him, which I assume he did.

Then, if it develops that the proper explanation was not given to Mr. Bearden at that time, then I will amend the sentence and comply with the direction of our Supreme Court in the case of Stevens versus the State at 245 Georgia Reports, page 835.

There are several other cases that hold the same thing as the Stevens case, but that's just one that I happened to remember.

All right. Come around, Mr. Bearden, and Mr. Lohr.

As to Case No. 8917, the State versus Danny Bearden for the offense of burglary, now, Mr. Bearden, you understand I'm now sentencing you to prison, the same as Judge Coker could have done on October the 8th, 1980, do you realize that?

MR. BEARDEN: Yes, sir.

THE COURT: It is the sentence of the Court that the defendant, Danny Bearden, serve a period of five years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

As to Case No. --

MR. VAN PELT: (Interposing) 8923.

THE COURT: Is that 8923?

MR. VAN PELT: Yes, sir.

THE COURT: 8923, State versus Danny Bearden for the offense of theft by receiving, it's the sentence of the Court that the defendant serve a period of three years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

However, Case No. 8923 is to be served concurrent with Case No. 8917. You'll be serving both sentences at the same time.

MR. BEARDEN: Yes, sir.

THE COURT: Now, Mr. Bearden, let me explain to you, you have the right to appeal to our Appellate Courts. If you desire to appeal, you must do so within 30 days from this date, and if you do not appeal within 30 days, then you would lose the right to appeal.

If you desire to appeal and you do not have the funds with which to pay a lawyer to appeal your cases, the Court will appoint a lawyer for that purpose.

You also have a right to seek a review of the sentence in Case No. 8917.

Now, if you desire to seek a review of this sentence, you must do so within 30 days or you would lose that right. Do you understand it?

MR. BEARDEN: Yes, sir.

THE COURT: All right. Do you have any questions that you want to ask me?

MR. BEARDEN: No, sir.

THE COURT: All right, sir. Now, I will ask the Court Reporter to ascertain which court reporter was here on October the 8th, 1980, and go back to these two cases where the pleas were entered, and get an excerpt of that portion of what was told by the Court to Mr. Bearden relative to what would happen to him if he violated any of the laws of the State or country, and was brought back into court.

It's very crucial, that point is very crucial, more crucial to Mr. Bearden than anyone else.

All right. That is the sentence of the Court.

(Hearing concluded.)

WITNESSES:

In addition to any persons named in the body of this instrument.

KEN HALE.....Prosecutor
C.C.S.O.

STEVE PAUKERT, MNGR.
c/o RODEWAY INN
133 W. BURNSIDE
POCATELLO, IDAHO 83201
(208) 237 - 0020

MARK SAUNDERS

JOSEPH LYNN ELLIS
32 TIMBER RIDGE TRAIL
RINGGOLD, GA

DOUG JONES
c/o DAYS INN MOTEL
GA HWYS. 146 & I-75
RINGGOLD, GA
891 - 9910

MIKE GARD
C.C.S.O.

SEE ADDITIONAL WITNESSES

No. 8923

SUPERIOR COURT

CATOOSA County

SEPTEMBER Term, 1980

THE STATE
—vs.—

DANNY BEARDEN

FELONY
INDICTMENT
for

THEFT BY RECEIVING STOLEN PROPERTY

true BILL

Nora Robbs Foreman

11th day of September, 1980

CATOOSA COUNTY, GA.
FILED IN OFFICE
9/11 1980

WILLIAM H. (BILL) CAMPBELL
District Attorney

Norman L. Stone

49

ADDITIONAL WITNESSES:

The Defendant DANNY BEARDEN

waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of 4 Jurors and pleads ~~guilty~~ not guilty. DB

Danny Bearden
Defendant

W. M. Phillips
Defendant's Attorney

WILLIAM M. (Bill) CAMPBELL, District Attorney

A. R. BROOKS J.P.

We, the Jury, find the Defendant ----------

This ----- day of ----------, 198---.

FOREMAN

GEORGIA, CATOOSA COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR SAID COUNTY, TO-WIT:

1. [illegible] Foreman
2. [illegible]
3. [illegible]
4. [illegible]
5. [illegible]
6. [illegible]
7. [illegible]
8. [illegible]
9. [illegible]
10. [illegible]
11. [illegible]
12. [illegible]
13. [illegible]
14. [illegible]
15. [illegible]
16. [illegible]
17. [illegible]
18. [illegible]
19. [illegible]
20. [illegible]
21. [illegible]
22. [illegible]
23. [illegible]

IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, CHARGE AND ACCUSE

DANNY BEARDEN

with the offense of FELONY, for that the said DANNY BEARDEN

did on the 11TH day of JULY in the year of our Lord Nineteen Hundred and Eighty in the County aforesaid, did unlawfully RECEIVE AND RETAIN STOLEN PROPERTY, TO WIT: ONE (1) RCA VCR VIDEO RECORDER, MODEL VBT 200, SERIAL NUMBER 7384HM128, THE PROPERTY OF STEVE PAUKERT, WITH A VALUE OF $1,000.00, KNOWING SAID PROPERTY WAS STOLEN, SAID PROPERTY NOT HAVING BEEN RECEIVED AND RETAINED WITH INTENT TO RESTORE IT TO THE OWNER,

y to the laws of said State, the good order, peace and dignity thereof.

WILLIAM N. (BILL) CAMPBELL
District Attorney

IN THE SUPERIOR COURT FOR THE COUNTY OF Catoosa

STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

Danny Bearden

DEFENDANT.

CASE NO. 8423

Catoosa TERM, 1980

OFFENSE: Theft by Receiving

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

The Defendant, Danny Bearden, having entered his plea of guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27-2702 through 27-2726.1), for a period of One (1) years, upon payment of a fine of $_____, $_____ costs, and restitution in the amount of $200.00. Said $200.00 restitution shall be paid within Four (4) months of October 8, 1980.

Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said defendant, during the term of this probation unless shall report to the Probation Officer of the Lookout Mountain Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall avoid no unlawful behavior and use and purchase same and shall keep no company with persons of bad reputation, avoid places of disreputable character, and visit the places where alcoholic beverages or drinks or narcotics are sold, and shall permit the Probation Officer to visit him there at home or elsewhere at any time, and shall work faithfully at suitable employment whether as possible, and shall violate no penal laws of this State or any state of the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be required by the Court or Probation Officer.

and shall

This Order is imposed pursuant to the provisions of Sections 27-2727 and 27-2728 of the Code of Georgia, Annotated.

FURTHER ORDERED that a copy of this Order be forwarded to the office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 5th day of October, 1953.

Robert E. Oker
JUDGE OF THE SUPERIOR COURT
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

WE HEREBY CONSENT TO THE WITHIN ORDER.

Danny Brewton
DEFENDANT

William M. Phillips
ATTORNEY FOR DEFENDANT

WITNESSES:

In addition to any persons named in the body of this instrument.

KEN HALE ..... Prosecutor
C.C.S.O.

MARTHA KUNGERGER
LOT 8, RT. 8
HICKORY GROVE TRLR. PARK
RINGGOLD, GA
DONNA M. STEVENS
301 A, INMAN ST.
RINGGOLD, GA
NORMAN HANSEN
C/O DAYS INN MOTEL,
GA HWYS. 146 & I-75
RINGGOLD, GA
MRS. DANNY BEARDEN

GEORGE BROWN
C.C.S.O.
J. D. STEWART
HAROLD BRADFORD
A. B. BROOKS
C.C.S.O.

SEE ADDITIONAL WITNESSES

No. 8917

SUPERIOR COURT

CATOOSA ..... County

SEPTEMBER ..... Term, 198 0

THE STATE
—vs.—

DANNY BEARDEN

FELONY
INDICTMENT
for

BURGLARY

True ..... BILL

Nora Robbs ..... Foreman

11th day of September, 198 0

CATOOSA COUNTY, GA.

Filed
Sept 11

WILLIAM R. (BILL) CAMPBELL
District Attorney

Norman L. Stone

The Defendant DANNY BEARDEN

waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of ____ Jurors and pleads ~~guilty~~ M.C. DB guilty.

Danny Bearden
Defendant

W M Phillips
Defendant's Attorney

WILLIAM M. (Bill) CAMPBELL, District Attorney

A. R. BROOKS J.P.

We, the Jury, find the Defendant _____

This _____ day of _____ 198____

_____ FOREMAN

...ICTMENT

GEORGIA,.....CATOOSA.....COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY
THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR SAID COUNTY, TO-WIT:

1. Nora Roberts Foreman
2. Martha Tuggle
3. Steve Simmons
4. Donald R. Simmons
5. Malcolm L. Thompson
6. Wayne M. Templeton
7. Sandra Thomas
8. Alma C. Callahan
9. William B. Chase
10. Edith B. Land
11. Henrietta E. Patton
12. Margaret Hinton
13. Barbara Canales
14. Herman & Martha
15. Charles E. Thompson
16. Steve E. Choate
17.
18.
19.
20.
21.
22.
23.

IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, CHARGE AND ACCUSE

DANNY BEARDEN

with the offense of FELONY, for that the said DANNY BEARDEN

did on the 7TH day of JULY in the year of our Lord Nineteen Hundred and Eighty
in the County aforesaid, did unlawfully AND WITHOUT AUTHORITY AND WITH INTENT TO COMMIT A THEFT THEREIN, ENTER THE MOBILE HOME DWELLING HOUSE OF MARTHA KUNGERGER, THE LAWFUL OCCUPANT THEREOF, SAID MOBILE HOME DWELLING HOUSE BEING THEN AND THERE LOCATED AT LOT 8, ROUTE 8, HICKORY GROVE TRAILER PARK, RINGGOLD, CATOOSA COUNTY, GEORGIA,

WILLIAM H. (BILL) CAMPBELL

IN THE SUPERIOR COURT FOR THE COUNTY OF Catoosa

STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

Danny Braden

DEFENDANT.

CASE NO. 8917

September TERM, 19 81

OFFENSE: Burglary

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

The Defendant, Danny Braden, having entered his plea of Guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27-2702 through 27-2726.1), for a period of Three (3) years, upon payment of a fine of $ 500.00, $ _____ costs, and restitution in the amount of $ 50.00. ~~Defendant~~ shall pay $100.00 of said fine in Nov. and $100.00 of said fine on or before Oct. 1st remaining $250.00 of said fine and restitution shall be paid ~~_____~~ within Four (4) months of October 8, 1982

Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said defendant, during the term of this probation sentence shall report to the Probation Officer of this Lookout Mountain Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall drink no alcoholic beverages nor use any narcotics nor persons same, and shall keep no company with persons of bad reputation, avoid places of disreputable character, and visit no places where alcoholic beverages or drinks or narcotics are sold, and shall permit the Probation Officer to visit him/her at home or elsewhere at any time, and shall work faithfully at suitable employment whether or possible, and shall violate no penal laws of this State or any state of the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be required by the Court or Probation Officer,

and shall

This Order is imposed pursuant to the provisions of Sections 27-2727 and 27-2728 of the Code of Georgia, Annotated.

Pictorial Exhibit No. 1

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FURTHER ORDERED that a copy of this Order be forwarded to the Office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 6th day of October, 19 50.

Robert E. Baker
JUDGE OF THE SUPERIOR COURT
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

WE HEREBY CONSENT TO THE WITHIN ORDER.

Dewey Bruton
DEFENDANT

William M. Phillips
ATTORNEY FOR DEFENDANT

State's Exhibit No. 1

9

CERTIFICATE EXEMPLIFICATION OF RECORD

STATE OF GEORGIA, CATOOSA COUNTY

CLERK'S OFFICE—ss.

I, NORMAN L. STONE, Clerk Superior Court of Catoosa County, do hereby certify that I have compared the foregoing copy of Indictments, Pleas and Sentences (First Offender) in Criminal Action 8923,

The State vs. Danny Bearden, charged with the offense of Theft by Receiving Stolen Property and Burglary.

with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record, and that this Court is a Court of Record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this the 29 day of May, 19 1

Norman L. Stone
Clerk Superior Court, Catoosa County.

54

State's Exhibit No. 1

OFFICIAL CERTIFIED COURT REPORTER'S CERTIFICATE

I, Scottie R. Hood, Official Certified Court Reporter of the Lookout Mountain Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings on June the 3rd, 1981, in the case of The State of Georgia versus Danny Bearden, and that the said proceedings were reduced to typewriting under my direct supervision.

This 30th day of June, 1981.

Scottie R. Hood

SCOTTIE R. HOOD, Official Certified Court Reporter, Lookout Mountain Judicial Circuit.
Certificate No. B-484.

IN THE SUPERIOR COURT OF CATOOSA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	INDICTMENT NUMBERS:
VS.	)	8917, 8923
DANNY BEARDEN	)	BURGLARY, THEFT BY RECEIVING

ORDER

THE ABOVE CASE HAVING COME ON TO BE HEARD BY THIS COURT ON THE STATE'S PETITION FOR REVOCATION OF PROBATION ON MARCH 3, 1981, AND AFTER HEARING EVIDENCE AND THE ARGUMENTS OF COUNSEL, AND AFTER CONSIDERING AND ASSESSING THE CREDIBILITY OF EACH AND ALL OF THE WITNESSES WHO TESTIFIED, THIS COURT FINDS AS FOLLOWS:

1.

THIS COURT HEREBY FINDS AS A MATTER OF FACT, FROM A PREPONDERANCE OF THE EVIDENCE PRODUCED AT THE ABOVE HEARING, AS FOLLOWS:

A.

THAT ON OCTOBER 8, 1980, THE DEFENDANT ENTERED PLEAS OF GUILTY UNDER THE FIRST OFFENDER'S ACT TO EACH OF THE ABOVE FELONY INDICTMENTS ALLEGING BURGLARY AND THEFT BY RECEIVING.

B.

THAT THE DEFENDANT WAS REPRESENTED BY COUNSEL AT THE TIME SAID PLEAS WERE ENTERED AND THAT THE PLEAS WERE KNOWINGLY AND VOLUNTARILY ENTERED.

C.

THAT BASED ON THOSE PLEAS, THE COURT SENTENCED THE DEFENDANT TO SERVE A TERM OF THREE (3) YEARS UNDER THE FIRST OFFENDER'S ACT AS TO INDICTMENT NUMBER 8917, CONDITIONED UPON PAYMENT OF A $500.00 FINE, AND $50.00 RESTITUTION, TO BE PAID WITHIN FOUR (4) MONTHS OF THE DATE OF SENTENCING. DEFENDANT WAS FURTHER SENTENCED TO SERVE A TERM OF ONE (1) YEAR UNDER THE FIRST OFFENDER'S ACT AS TO INDICTMENT NUMBER 8923, CONDITIONED UPON PAYMENT OF $250.00 RESTITUTION, ALSO TO BE PAID WITHIN FOUR (4)

D.

THAT AS OF THE DATE OF THE ABOVE HEARING ON JUNE 3, 1981, THE DEFENDANT HAD PAID ONLY $200.00 TOWARD THE $750.00 TOTAL OF FINES AND RESTITUTION WHICH HE HAD BEEN ORDERED TO PAY BY FEBRUARY 8, 1981, AS A CONDITION OF HIS PROBATION.

E.

THAT THE DEFENDANT HAD ALSO FAILED TO REPORT TO HIS PROBATION OFFICER AS DIRECTED.

2.

THIS COURT FURTHER FINDS AS A MATTER OF LAW THAT THE FAILURE TO PAY FINES AND RESTITUTION ORDERED AND FAILURE TO REPORT CONSTITUTED A VIOLATION OF THE EXPRESS TERMS AND CONDITIONS OF THE DEFENDANT'S SENTENCE OF PROBATION UNDER THE FIRST OFFENDER'S ACT ENTERED ON OCTOBER 8, 1980.

3.

IT IS THEREFORE ORDERED THAT THE DEFENDANT'S SENTENCE OF PROBATION UNDER THE FIRST OFFENDER'S ACT BE REVOKED AND THE DEFENDANT IS REMANDED TO THE CUSTODY OF THE DIRECTOR OF THE DEPARTMENT OF OFFENDER REHABILITATION FOR EXECUTION OF THE SENTENCE ENTERED PURSUANT TO THE FIRST OFFENDER'S ACT.

THIS 19th DAY OF June, 1981.

Joseph E. Loggins

JOSEPH E. LOGGINS
JUDGE, SUPERIOR COURT
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

Filed in office
June 25, 1981
/s/ Mary R. Sutherland,
Deputy Clerk

SENTENCE

THE STATE

vs.

Ly Bearden

No. 8917

Catoosa SUPERIOR COURT

DETERMINATE SENTENCE

TERM Five (5) YEARS

OFFENSE Burglary

PLEA: NOT GUILTY First Offender Treatment GUILTY

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendant serve the full term of 5 (years) (months) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said Sentence to run CONCURRENTLY—CONSECUTIVELY to _____

That the defendant be confined at work at a Public Works Camp or elsewhere as the law directs for a period of _____ months; and that the defendant be confined in the common jail of said County for a period of _____ months, to be computed as provided by law.

However, it is ordered that the defendant be relieved of and discharged from the foregoing imprisonment upon payment of a fine of $_____ $_____ costs.

However, the defendant is given leave to serve the _____ said sentence outside of said penitentiary, Public Works Camp, and fail on Probation upon payment of a fine of $_____ $_____ costs.

Provided, however, that the said defendant, during the term of this probation sentence shall report to the Probation Officer of the Lookout Mountain Judicial Circuit as shall be directed by the Court or said Probation Officer, and to serve the jurisdiction of the Court without the permission of the Court, and shall abide by the standard conditions that are now prescribed by the Probation Office of this Court, and such other conditions, and from time to time, and shall work faithfully at suitable employment as far as possible, and shall support his dependents, and shall remain within a specified area, and shall not leave such area without the consent of the Probation Officer or further order of the Court, and shall not violate any penal laws of this State or any State of the United States or any county, municipal ordinance and be of good behavior, and shall observe such rules and regulations as may from time to time be required by the Court or Probation Officer and shall

This 3d day of June, 1981

[redacted], District Attorney

[redacted] David L. Lominick, Jr.

Joseph E. Loggins

Judge, Superior Court, Lookout Mountain Judicial Circuit

SENTENCE

THE STATE

vs.

Danny Bearden

No. 8923

Catoosa SUPERIOR COURT

DETERMINATE SENTENCE

TERM Three (3) YEARS

OFFENSE Theft by Receiving

PLEA: NOT GUILTY Entered by Plea GUILTY

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendant serve the full term of 3 (years) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said Sentence to run CONCURRENTLY ~~CONSECUTIVELY~~ to # 8917 (Burglary) c

That the defendant be confined at work at a Public Works Camp or elsewhere as the law directs for a period of _____ months, and that the defendant be confined in the common jail of said County for a period of _____ months, to be computed as provided by law.

However, it is ordered that the defendant be relieved of and discharged from the foregoing imprisonment upon payment of a fine of $_____ & _____ costs.

However, the defendant is given leave to serve the _____ said sentence outside of said penitentiary, Public Works Camp, and jail on Probation upon payment of a fine of $_____ & _____ costs.

Provided, however, that the said defendant, during the term of this probation sentence shall report to the Probation Officer of the Lookout Mountain Circuit or that be directed by the Court or said Probation Officer, not to leave the jurisdiction of the Court without the permission of the Court, and shall defend no disorderly houses nor any are gamblers nor persons who [illegible] and shall keep no company with persons of bad reputation, and shall not frequent such places, and not go places where disorderly persons are permitted to be, and shall keep sober, and refrain from visiting places of [illegible] or elsewhere at any time, and shall work faithfully at suitable employment provided or procured, and shall pattern the Probation Officer in all his or any state or the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be imposed by the Chattooga Probation Officer.

and shall

This 31 day of June, 19 81

[redacted], District Attorney

L. M. Campbell

Judge Superior Court, Lookout Mountain Judicial Circuit

IN THE SUPERIOR COURT OF CATOOSA COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
Plaintiff	*	CRIMINAL ACTION
VS	*	NOS: 8917 and 8923
DANNY BEARDEN	*	
Defendant	*	

ORDER

The Defendant's Motion to Modify Sentence in the above cases having come to be heard by this Court on the 9th day of September, 1981, and it appearing upon a hearing of said motion that the record of these cases does not show that the Defendant was properly instructed as to the possible results of the revocation of his probation at the time the Defendant entered his pleas of guilty under the First Offenders Act on October 8, 1980,

IT IS THEREFORE ORDERED that the Defendant's sentences as entered by this Court on the 3rd day of June, 1981, are hereby modified and amended as follows: The Defendant shall serve the remaining time of his probation as specified in the Court orders entered in the above cases and dated the 8th day of October, 1980, in the penitentiary or such other institutions the Director of the State Board of Corrections may direct, to be computed as provided by law.

This the 17th day of September, 1981.

Joseph E. Loggins

JOSEPH E. LOGGINS
Judge, Superior Court
Lookout Mountain Judicial Circuit

FEB 24 1982

62930. BEARDEN v. THE STATE. P-209

POPE, Judge.

Danny Ray Bearden appeals the revocation of his probation. He enumerates as error the revocation of his probation on a ground not asserted in the petition to revoke his probation. He also enumerates a violation of the Constitution in the trial court's revocation of his probation on the ground that he had failed to pay the fine and restitution assessed.

On October 8, 1980 appellant pled guilty to the offenses of theft by receiving stolen property and burglary. He was placed on probation as a first offender pursuant to Code Ann. § 27-2727. For the offense of theft by receiving stolen property, he was required to serve one year on probation upon payment of $200.00 restitution, said restitution to be paid within four months of October 8, 1980. For the offense of burglary he was required to serve three years on probation upon payment of a fine of $500.00 and restitution in the amount of $50.00; appellant was required to pay $200.00 of the fine almost immediately and $350.00

comprising fine and restitution within four months of October 8, 1980. The state moved on May 27, 1981 to revoke appellant's probation on the grounds that he had committed a burglary on May 10, 1981 and also that he had failed to pay the $550.00 balance of the foregoing fine and restitution. Following a hearing on the petition on June 3, 1981, the trial court found that appellant had not paid the required fine and restitution and also found that appellant had failed to report to his probation officer as directed." The trial court revoked appellant's probation and sentenced him to concurrently serve five years for the offense of burglary and three years for the offense of theft by receiving stolen property.

1. Appellant testified during the course of his revocation hearing that he was unemployed and could not pay any portion of the $550.00 balance of the fine and restitution. "This testimony provided an adequate basis for the trial court's order revoking appellant's probation. 'Only slight evidence is required to authorize revocation, (cit.) and where there is even slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been manifest abuse of

discretion. (Cits.)' Boston v. State, 128 Ga. App. 576 (197 SE2d 504)(1973). Thus, even assuming that the record supported appellant's contention that the trial court based its revocation order in part upon his [failure to regularly report to his probation officer], no notice of which ground was provided to him prior to the revocation hearing, the order of the trial court revoking his probation will nevertheless be upheld because it rests alternatively upon the independent determination by the court that appellant violated yet another of the conditions of his probation." Simmons v. State, 156 Ga. App. 336, 337 (274 SE2d 726)(1980); see also Simpson v. State,154 Ga. App. 775 (2) (270 SE2d 50)(1980), vacated on other grounds, Simpson v. Georgia, 450 U.S. 972 (101 SC 1504, 67 LE2d 808)(1981). Compare Radcliff v. State, 134 Ga. App. 244 (214 SE2d 179)(1975).

2. Appellant contends that because he was indigent the revocation of his probation for failure to pay the required fine and restitution violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. This contention has been decided adversely to appellant in Hunter v. Dean, 240 Ga. 214 (239 SE2d

791)(1977); Calhoun v. Couch, 232 Ga. 467 (207 SE2d 455)(1974); but see Wood v. Georgia, 450 U.S. 261, 284-287 (101 SC 1097, 67 LE2d 220)(1981) (White, J., dissenting). We see no basis for distinguishing this case, where appellant was placed on probation as a first offender pursuant to Code Ann. § 27-2727, from the foregoing cases, where the appellants were apparently not entitled to first offender status and were placed on probation pursuant to Code Ann. § 27-2709. Code Ann. § 27-2727 provides that upon violation of the terms of probation, the trial court is authorized to enter an adjudication of guilt and "proceed as otherwise provided" under the Statewide Probation Act, Code Ann. § 27-2702 et seq. No matter under which provision of the Act probation is given, a criminal defendant is subject to revocation of his probation if he is found to have violated the conditions thereof.

Judgment affirmed. Quillian, C. J., and McMurray, P. J., concur.

Court of Appeals
of the State of Georgia

ATLANTA, March 15, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

62930 Danny R. Bearden v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied. (Original opinion dated February 24, 1982)

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA MAR 15 1982

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

Alton Hawk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta APR 8 1982

Case No. 38642. Bearden v. The State

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CERTIFICATE OF SERVICE 81-6133

I, JAMES H. LOHR, hereby certify that a true and exact copy of the foregoing Brief for Petitioner was served upon Counsel for the Respondent by depositing the document in a United States Post Office or mailbox, with first-class postage prepaid, addressed to George H. Weaver, 132 State Judicial Building, 40 Capitol Square, S.W. Atlanta, Georgia 30334.

This the 3rd day of August, 1982.

Jim Lohr
JAMES H. LOHR

RECEIVED
AUG 6 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF FILING UNDER RULE 28 81-6633

I, JAMES H. LOHR, hereby certify and swear that I personally deposited in a United States Post Office or mailbox on July 7, 1982, with first-class postage prepaid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the foregoing Brief for Petitioner.

Jim Lohr
JAMES H. LOHR

Sworn to and subscribed before me this the 3rd day of August, 1982.

Anne Slack
Notary Public

My Commission Expires: 12/4/84

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AUG 6 1982
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81 6633

RECEIVED
MAY 3 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DANNY R. BEARDEN,

Petitioner

vs.

STATE OF GEORGIA

Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Danny R. Bearden respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the rules of this Court. The affidavit of Danny R. Bearden in support of this motion is hereto attached.

Filed herewith is a petition for writ of certiorari of the moving party.

This the 29th day of April, 1982.

Respectfully submitted,

HATFIELD, McCOLPIN,
VAN CLEAVE & STUICE

BY: Jim Lohr

James H. Lohr
Attorney for Petitioner
428 McCallie Avenue
Chattanooga, Tennessee 37402

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

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DANNY R. BEARDEN

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vs.

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Respondent

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, DANNY R. BEARDEN, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on a writ of certiorari without being required to prepay fees, costs, or give security thereof, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of this proceeding are true.

1. Are you presently employed?

   Answer: No.

   a. Not Applicable

   b. My last employment ended in November of 1980. I received approximately $ 760.00 per month when I was last employed.

2. Have you received within the past twelve months any income from a business, profession or other form or self-employment, or in the form of rent payments, interest, dividends, or other source?

   Answer: No.

   a. Not applicable

3. Do you own any cash, checking or savings accounts:

Answer: No.

a Not applicable

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

a. Not applicable

5. List the persons who are dependent upon you for support and state your relationship to those persons.

1. Jean Bearden - wife
2. Rachael Bearden - child, age
3. Christopher Bearden - stepchild, age

The petition states that he is incarcerated in the County jail at Catoosa County, and that although he is responsbile for the support of his family he has been unable to provide any support while he has been incarcerated.

The petitioner further states that because of his indigency James H. Lohr was appointed to represent petitioner in the Superior Court of Catoosa County, Georgia, (see Appendix to Petition for Writ of Certiorari, page 1), and that the James H. Lohr has represented petitioner in prior appeals in this case before the Georgia Appellate Courts.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

This the 21st day of April, 1982.

Danny R Bearden
DANNY R. BEARDEN

STATE OF Georgia
COUNTY OF Catoosa

Personally appeared before me, the undersigned authority, DANNY R. BEARDEN, the person known to me who made oath that he executed the foregoing instrument, and acknowledged that he executed the same as his own free act and deed for the purposes contained therein.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires:_____